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The Role of The Attorney General in Environmental Enforcement

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I. INTRODUCTION

New York State is blessed with a variety and abundance of natural resources. The people of the State have long been conscious of this unique natural heritage, and we are fortunate that our predecessors had the foresight to enact constitutional and statutory measures for the preservation and protection of this natural legacy. In fact, New York has historically been a leader among the states in environmental protection and conservation of natural resources.

For example, New York is unique among the states in providing a constitutional mandate that certain state-owned forest lands "be forever kept as wild forest lands."[1] The Adirondack Park Agency Act[2] was, at its enactment in 1971, the most ambitious, creative and comprehensive effort in the nation to regulate land use on a regional basis. Following Congress' enactment of the National Environmental Policy Act (NEPA),[3] New York was one of the first states to enact a "little NEPA" requiring environmental review by state and local agencies prior to undertaking, funding or approving an action.[4] New York is also one of the few states to have an Endangered Species Act, which protects endangered and threatened species and their habitat from disturbance or destruction.[5] There are other examples, too numerous to recite here. Suffice it to point out that the Environmental Conservation Law consumes five McKinney's volumes, evidence of the seriousness with which New York views its responsibility to act as steward of its natural resources.

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The Role of The Attorney General in Environmental Enforcement

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The people of New York State are also the beneficiaries of a strong and varied economic base. The State's wide array of industrial, commercial, and institutional entities provides needed jobs, goods, and services. These active businesses form the front line of environmental protection: without widespread compliance with the law, no amount of governmental enforcement could prevent New York's natural resources from being squandered or despoiled. However, this same industrial base presents numerous situations where business interests must address the need for environmental protection. In addition, New York's long industrial history has left a legacy of polluted sites, many abandoned, that demand remediation and restoration.

The enforcement of environmental laws embodies the balance between protection of New York's extraordinary natural resources and the public health on the one hand, and its economic engine on the other. Sound enforcement ensures a legal infrastructure supportive of those who voluntarily comply, and helps fulfill the promise made by the Legislature to the citizens of the State when it passed the environmental laws. While the state Department of Environmental Conservation (DEC) is the state's primary environmental enforcer, the Attorney General's Environmental Protection Bureau (EPB) also plays a critical role. The EPB must both use all legal tools as effectively as possible to represent DEC in court, and must, at times, act independently to ensure compliance with laws designed to protect the State's natural resources and to assist those businesses interested in full compliance. The purpose of this article is to establish the context for the State's environmental enforcement and outline the Attorney General's opportunities to use state and federal statutes to enforce environmental rights and remedies.

II. THE NEED FOR INCREASED ENFORCEMENT

Both the state of the environment and the extent of noncompliance with environmental requirements demand continuing vigilance of New York's agencies regarding environmental enforcement.

A. Environmental and Public Health Problems Continue

Today our environment, while better in some respects than it was thirty years ago, is still in fairly serious trouble. Indeed, a prominent conservation biologist recently asserted that "the current frenzy of environmental degradation is unprecedented."[6] There are, unfortunately, many indications that this assessment is correct. For example:

- Over one third of our nation's rivers, streams, lakes, ponds, and estuaries are impaired, meaning that they are not clean enough for the uses the states have designated for them.[7] In addition, 97% of the surface area of the Great Lakes is impaired.[8] In New York, many Adirondack and Catskill lakes and streams are incapable of supporting native communities of aquatic life.[9] The state Department of Health has issued a health advisory recommending that "no one should eat more than one meal of fish per week from any of the state's fresh waters" and that women of child-bearing age and children under 15 should eat none.[10]
- States have identified over 20,000 individual water bodies as polluted, including 300,000 miles of river and shoreline and five million acres of lakes.[11] The overwhelming majority of the U.S. population lives within ten miles of these polluted waters.[12]
- The United States has lost over half of its wetlands—New York has lost over 60%—and we continue to lose wetlands at a rate of up to 100,000 acres per year, despite a pledge of "no net loss" of wetlands.[13]
- Each year, thousands of ocean, bay, and Great Lakes beaches are closed to the public because of pollution.[14] Countless numbers of beaches on smaller water bodies are also closed. In 1998 alone various ocean, bay, and Great Lakes beaches were closed for a total of 10,012 days, including a total of 384 days of closings at several dozen New York beaches.[15]
- Contamination of fish due to industrial pollution remains extremely widespread and appears to be increasing. Thirteen states, including New York, have statewide fish consumption advisories for all their waters.[16] In New York alone, there are 404 different advisories for different pollutants, fish species, and waters.[17]
- The American Lung Association estimates that nearly 120 million people, including over 25 million children and 14 million seniors, live in areas that violate the federal Clean Air Act standard for ozone, a pollutant that irritates the lungs and causes a range of respiratory diseases.[18] In New York, the air in all of New York City and Long Island as well as some upstate areas violatees the ozone standard.[19]
- Over 60,000 premature deaths each year are attributed to particulate air pollution, including an estimated 5,600 in New York alone.[20]
- In the last fifty years, over 75,000 chemicals have been developed and used in commerce.[21] Few have been fully tested. Perhaps not coincidentally, childhood cancers increased by ten percent between 1974 and 1994.[22]
- A recent report estimates that almost 50 million people drink water from sources that do not meet federal drinking water standards for contamination levels or treatment.[23] In a recent U.S. Geological Survey study, at least one pesticide was found in over 95% of river and stream samples.[24] A poll disclosed that almost one

half of the nation's population do not drink their tap water.[25]

- In the United States, 1,730 species are listed as threatened or endangered;[26] New York alone lists 85 species as endangered or threatened, and another 66 species are proposed to be listed.[27]
- For persons of color, the health problems associated with pollution are even more severe than the general population. Pediatric asthma rates in the Bronx are twice the national average.[28] Pediatric asthma increased 73% between 1982 and 1994.[29] The vast majority of bus depots and solid waste transfer stations—which generate high levels of airborne pollutants—in New York City are in non-white neighborhoods.
- More broadly, atmospheric carbon dioxide, which contributes to global climate change, has increased 30% over the last one hundred years; eleven of the past sixteen years have been the warmest of the century; polar ice caps are thinning in places by over a meter a year; and the number of intense rain storms has increased significantly over the last century.[30]

The point is clear: the environment and public health are far from where we want them to be. We have a long way to go to reduce pollution and its effects.

B. Noncompliance Remains High

While many businesses make great efforts to comply with environmental requirements, unfortunately, noncompliance remains high. For example, recent EPA studies reveal:

- 40% to 50% percent of major water pollution sources are in significant non-compliance with the Clean Water Act.[31] "Significant noncompliance" means the violation is either quite serious or chronic.
- Approximately 40% of major air pollution sources are in significant noncompliance with the Clean Air Act.[32]
- Approximately one quarter of land disposal facilities (e.g., landfills) are in significant non-compliance with solid and hazardous waste laws.[33]

In addition, and more specifically, an industry-sponsored study found that over half of surveyed facilities were in violation of stormwater pollution rules.[34] Similarly, despite requirements to limit and monitor discharges of shop fluids, 80% of automotive service stations could not identify to where their shop fluids drains led.[35]

Thus, contrary to the prevailing myth of widespread compliance, noncompliance rates remain at unacceptable levels, with concomitant environmental degradation.

C. Enforcement Is Inadequate and Infrequent

Despite claims that enforcement levels are already high, the facts show otherwise:

- Federal enforcement budgets are down from previous years, as are most state enforcement budgets. Federal assistance to state enforcement has fallen to nearly half of what it was in earlier years.[36]
- State enforcement numbers are down nationwide. For example, only 38% of facilities found to be in significant noncompliance for two straight years have been the subject of state enforcement actions.[37] Overall, enforcement in sixteen states (including New York and California) decreased by over 70% over a recent four year period.[38] An EPA Inspector General report found that many states regularly do not seek monetary penalties from violators despite statutory mandates and EPA's penalty policy.[39]

D. Enforcement and the Marketplace

How many people would pay their taxes, year after year, if there were no threat of enforcement? How many would never speed if they knew that police officers had been pulled off the road? How many would never cut corners during construction if there were no building inspectors? The answer is that economic and other considerations provide powerful incentives to avoid compliance with the law. We know enforcement is necessary to obtain levels of compliance necessary to maintain the social contract.

The situation is no different in the environmental arena. A persistent failure to enforce environmental laws inevitably leads to a shift in the cost-benefit analysis, with the hazards of noncompliance diminishing as the potential rewards of avoiding environmental compliance increase. At its worst, the failure to enforce creates market conditions that actually harm those companies that comply with the law. In such a case, where economic and other penalties for noncompliance are erased through lack of enforcement, law-abiding companies are placed at a competitive disadvantage compared to others that avoid the costs of environmental compliance. Thus, the absence of credible enforcement can work to penalize companies that are conscientious about their environmental responsibilities. Only by mounting a consistent and fair enforcement effort that includes monetary penalties that, at a minimum, offset the economic benefits of noncompliance, can we level the playing field.

III. THE ATTORNEY GENERAL'S ENVIRONMENTAL ENFORCEMENT POLICY

Broadly stated, our office is dedicated to the aggressive and fair enforcement of federal and state environmental laws. The majority of the office's enforcement cases are referred by DEC, but the Attorney General's office has always acted independently as well. In all cases, we work with agency staff or experts to ensure that enforcement matters proceed on a technically sound and legally solid basis. We pursue violations based on severity, not politics or perception. Critical to an effective enforcement program, we give companies a fair chance to come

into compliance prior to litigation, but once in litigation ensure that the results provide adequate general deterrence.

More specifically, it is our view that a successful environmental enforcement program must:

(1) be aggressive and innovative in the legal tools used for enforcement;

(2) be consistent and fair in its selection of potential targets;

(3) ensure that monetary penalties are sufficient to offset the economic benefits of noncompliance and provide financial deterrence against future violations;

(4) utilize, where appropriate, criminal sanctions;

(5) maintain an awareness of and sensitivity to environmental justice issues; and

(6) maintain flexibility.

A. The Attorney General's Legal Tools

The Attorney General is committed to the full and effective use of all legal tools at his disposal to ensure environmental compliance. Our office is working with DEC, the Adirondack Park Agency, and other state agencies to ensure that we prosecute promptly and effectively the cases that they refer to us for enforcement. We are also working closely with these agencies to develop new approaches to environmental enforcement and, in particular, to enforce laws that in some cases have lain dormant for years. For example, the Attorney General, on behalf of DEC, recently sought and obtained a preliminary injunction under the State's Endangered Species Act, marking the first time since the law's enactment in 1972 that judicial enforcement of the Act's provisions had been sought. This resulted in the first judicial opinion interpreting the Act.[40]

In addition to his traditional constitutional responsibility to represent the interests of state agencies, the Attorney General has independent statutory authority to enforce state law, including environmental laws. Because it is less often used and thus less well understood than the Attorney General's authority to represent state agencies, the sources of the Attorney General's independent authority will now be discussed.

1. Executive Law

The primary source of the Attorney General's authority is the Executive Law. Two important provisions of the Executive Law, which have historically seen little use in the environmental arena, have recently been used by our office in environmental enforcement actions.

Executive Law § 63(1) provides, *inter alia*, that the Attorney General shall "[p]rosecute and defend all actions and proceedings in which the state is interested and have charge and control of all the legal business of the departments and bureaus of the state . . . ."[41] In actions brought pursuant to this section, the Attorney General "represents the whole people and a public interest . . ."[42] and functions as "the law officer of the state, by whom all actions brought by or on behalf of the people of the state must be prosecuted."[43] This provision, understood as codifying the Attorney General's common law authority, has a long history of being read broadly.[44]

The Attorney General recently relied on this provision in suing to halt the proposed auction of 115 community gardens by the City of New York.[45] In that action, we alleged that the proposed sale violated the State Environmental Quality Review Act (SEQRA)[46] in that no environmental review had been conducted by the city prior to placing the gardens on the auction block. Although SEQRA contains no enforcement provisions of its own, the Attorney General brought the action pursuant to the authority conferred by Executive Law § 63(1) to prevent an egregious violation of state law, and to protect from destruction a significant urban environmental resource.[47] The action resulted in issuance of a preliminary injunction enjoining the auction, and the eventual purchase and preservation of the gardens by two non-profit organizations.

Another key provision is Executive Law § 63(12), which authorizes the Attorney General to apply to Supreme Court for injunctive relief, restitution and damages from any person who "shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transacting of business." The Attorney General is further authorized, "in connection with any such application," to "take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules." Thus, this provision not only grants the Attorney General authority to bring actions to enjoin persistent fraud or illegality, but also provides him with the investigative tools to demand production of documents and witnesses.

The authority granted the Attorney General by Executive Law § 63(12) is broad,[48] as reflected in the provision's expansive definitions of its operable terms. The term "fraud" as used in § 63(12) includes "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." This definition has consistently been interpreted to be much broader than that of common law fraud.[49] In addition, violation of any state law or regulation constitutes "illegality" within the meaning of § 63(12) and is actionable under that provision when the violation is persistent or repeated.[50] In the environmental context, the Attorney General's powers under § 63(12) could be used, for example, to investigate falsified discharge monitoring reports, concealment of unpermitted emission sources from a regulatory agency, sale of unregistered pesticides, false or misleading statements in permit applications or environmental impact statements, and a variety of other practices that fall within the provision's expansive definition of "fraud."[51]

The scope of the subpoena power under § 63(12) is far-reaching, and is designed to afford the Attorney General broad discretion in the conduct of investigations under this provision. It is not necessary for the Attorney General to possess definitive proof of persistent fraud or illegality before issuing a § 63(12)

subpoena. At the investigative stage, issuance of a subpoena will be sustained where "the Attorney General establish[es] some relevancy and basis for [the] investigation."[52] As one court has stated:

> The obvious purpose of the provision empowering the attorney general to make an investigation and to issue subpoenas in connection therewith is to enable him to determine whether or not the prohibited acts have been committed, in order that he may decide whether an action for injunctive and other relief should be brought. To hold that, in order to issue subpoenas, as an aid in his investigation, the attorney general must first show the actual commission of repeated and persistent fraudulent and otherwise illegal acts, would defeat the clear and manifest intent of the statute. If the attorney general already possessed adequate proof of such persistent fraud, he would not need the subpoena power conferred upon him by the statute.[53]

The utility of this broad subpoena for environmental investigations is self-evident. We have recently used this power in a number of contexts, allowing us to uncover activities harmful to the environment.[54]

2. Environmental Conservation Law

While the Commissioner of DEC is charged with implementing the Environmental Conservation Law (ECL), the Attorney General also possesses certain independent enforcement authority under the ECL. Article 71 of the ECL sets forth civil and criminal enforcement provisions for the state's environmental laws, and explicitly authorizes the Attorney General to make use of them.[55] The Attorney General's independent authority to enforce the state's environmental laws is reiterated in other provisions of the ECL, where he is granted authority to, among other things, enforce the state's air pollution, water pollution, wetlands protection and solid and hazardous waste laws.[56]

3. Public Nuisance

The Attorney General's office has historically been a leader in utilizing traditional public nuisance claims to enforce the state's environmental and public health laws. In fact, many of the seminal cases in the field of New York public nuisance law have been litigated by this office, including the *Love Canal*,[57] *Shore Realty*,[58] and other seminal cases.[59] The Attorney General has returned to reliance on traditional public nuisance claims in a recent action filed against the General Electric Company for obstruction of navigation in the Hudson River related to PCB contamination,[60] and against an asphalt transfer facility for noxious odors and persistent permit violations.[61]

4. Federal Environmental Laws

The citizen suit provisions of federal environmental laws provide an additional enforcement tool in cases where federal clean air, clean water, or hazardous waste laws have been violated. These provisions, which are generally similar in each of the major federal environmental statutes, confer standing on "citizens"[62] to, among other things, bring enforcement actions against violators after first providing sixty days written notice to the violator, the state environmental agency, and the U.S. Environmental Protection Agency. Most recently, as part of our continuing effort to combat acid rain and urban smog, this office commenced citizen suits under the federal Clean Air Act against several Midwestern utilities whose power plants had undergone major modifications, allowing them to emit additional pollutants, without obtaining required federal and state permits and installing the required pollution controls.[63]

B. Selection of Enforcement Targets

When DEC or another administrative agency refers a case to this office for the filing of an enforcement action, the target has already been selected by the administrative agency. As noted, such referred cases constitute the bulk of the office's enforcement case load. In most cases, the agency's selection of a particular target is based on:

- the gravity of the environmental violation;
- the need for immediate injunctive relief;
- intransigence on the part of the violator;
- a history of violating administrative consent orders; or
- a combination of these factors.

In cases where the Attorney General is acting pursuant to his independent authority, this office bases selection of targets on similar factors. We give highest priority to investigation of those cases involving serious environmental harm or a substantial threat to public health. Prompt injunctive relief is particularly important where continuing environmental violations result in ongoing environmental or public health impacts. Similarly, we will give increased scrutiny to companies that have a history of significant environmental violations, or that have demonstrated a consistent unwillingness or inability to comply with environmental regulations.

We have also made an effort to solicit information from the public about environmental threats that the State may otherwise be largely unaware of. In 1999, the Environmental Protection Bureau conducted a series of public meetings throughout the state, where citizens were invited to voice their concerns about particular environmental and public health problems affecting their communities. Several matters that were brought to our attention during those meetings are now the subject of ongoing investigations by this office. In addition, we hired an experienced community advocate and continue to use our own strong ties to environmental organizations to ensure an appropriate level of response to the public's environmental concerns.

As has DEC, this office now has a broader definition of a "target." Industrial sources that have been referred by an agency for enforcement action, or that are the subject of an independent investigation by the Attorney General, are now routinely subjected to a multi-media, plant-wide review for environmental compliance.[64] Thus, for example, a source that is referred for

air pollution violations will also be reviewed for compliance with water pollution, hazardous waste, and other applicable environmental regulations. This approach has already proved fruitful in identifying a variety of environmental violations at industrial facilities.[65]

C. Civil Penalties

We believe that civil penalties are, in almost all cases, a vital component of environmental enforcement. Civil penalties must, at a minimum, offset the economic benefit of noncompliance. This is consistent with EPA's and DEC's official penalty policies. To achieve this end, substantial discovery of corporate operations and finances must occur before an appropriate penalty amount can be calculated. Accordingly, companies should expect materials relevant to such an inquiry to be sought in discovery. In addition, companies wishing to negotiate settlements must understand that they will be expected to produce such materials as a prerequisite to discussing penalty amounts.

Furthermore, civil penalties should have sufficient punitive effect to provide a financial deterrence to similar conduct. In making this assessment, it is necessary to understand the financial condition of the defendant. Clearly, the penalty amount that will provide sufficient deterrent value will differ significantly between a Fortune 500 company and a smaller, local operation.

Although civil penalties are an important enforcement tool, in appropriate cases penalties may be significantly reduced or waived completely. We have granted, and will continue to consider, penalty reductions or waivers when, for example, the violator commits to significant process changes to eliminate or substantially reduce pollution sources; when the subject violations are the result of unforeseen and unpreventable occurrences or upsets; or when the violator commits to undertaking an environmental benefit project that has significant environmental value and there is a nexus between the project and the underlying violation.

D. Criminal Sanctions

Criminal sanctions are a highly effective tool in providing deterrence and punishment for serious environmental wrongdoing. Where appropriate, the Attorney General will seek criminal sanctions against those who intentionally or recklessly violate the State's environmental laws. We have instituted a new policy pursuant to which each significant civil enforcement case is reviewed for potential referral for criminal prosecution. This is done in close cooperation with the agency that would make the criminal referral in most cases DEC. This policy has already resulted in concurrent civil and criminal actions against one corporate polluter.[66]

Factors that are considered in evaluating a case for criminal enforcement include whether there is evidence that the violations were intentional or reckless, as well as the environmental and public health impacts of the violations.

E. Settlement

In nearly all enforcement cases, the policy of our office is to provide an early opportunity for settlement of the State's claims. We firmly believe that it is more productive for a defendant's resources to be expended on improving environmental compliance than on litigation. Consequently, in almost all cases our office will provide an opportunity for settlement to be discussed prior to initiating litigation.

The exceptions to this general rule are cases involving ongoing damage to the environment or public health, where prompt injunctive relief is necessary, and cases involving violators who have demonstrated a past resistance to negotiation, or who have a history of significant noncompliance. Moreover, in cases referred to the Attorney General by DEC, the parties will have often already fruitlessly discussed settlement. In these circumstances, we may commence an action prior to any additional settlement discussions (though this does not necessarily preclude later settlement discussions).

At a minimum, settlements must provide for remediation of environmental damage caused by the violation, where practicable; cessation of the violation; payment of appropriate civil penalties; and such other commitments as are necessary to ensure that violations are not repeated. Whether conducted with an administrative agency or with the Attorney General, settlement negotiations must be strictly limited in time and not be allowed to excessively delay resolution of a matter or prejudice the State's position. That being said, we encourage defendants to propose innovative and creative solutions to environmental problems, particularly those that involve eliminating or substantially reducing pollution.

F. Environmental Justice

Our office is committed to maintaining issues of environmental justice in the forefront of concerns in choosing enforcement priorities.[67] The lawsuit to preserve community gardens in New York City, discussed above, was an important environmental justice action because the majority of community gardens are located in low-income neighborhoods with predominantly Hispanic or African-American communities.

Many urban issues we are involved in or investigating raise significant environmental justice concerns. For example, because of the locates of most diesel truck and bus depots or routes in low income areas, Projects that rely heavily on diesel vehicles raise environmental justice and health concerns. We recently challenged the City's analysis of Sanitation truck exhaust on these grounds.[68] Similarly, we are researching the exposure of urban children to pollutants, particularly pesticides, with an eye toward advocating changes to risk tolerance and application regulations.

On another environmental justice front, our office has begun working cooperatively with Indian nations to assist them in resolving long-standing environmental problems, many of which involve impacts to reservation lands from outside sources. For example, we are currently working jointly with Indian nations

with respect to past illegal disposal of medical wastes on reservation lands by non-Indians, and natural resource damages caused by off-reservation polluters. On another front, the office recently filed the first case in New York under the federal Native American Grave Protection and Repatriation Act[69] to protect Native American remains and cultural items.[70]

G. Maintaining Flexibility

While the above describes the general framework for environmental enforcement by this office, the considerations and factors discussed have not been, and will not be, rigidly applied. To the contrary, we are firmly convinced that a successful environmental enforcement program must maintain some degree of flexibility. Fairness and equity demand that each case be evaluated on its own merits. Blind adherence to previously formulated rules serves neither the environment nor the public interest.

The challenge of any enforcement program is to strike the correct balance between consistency in the enforcement of regulations and the penalties exacted on the one hand, and tailoring enforcement decisions and remedies to fit individual circumstances on the other. Consistency in the application of enforcement policy is the touchstone for equitable treatment of similarly situated offenders. At the same time, however, the individual facts and circumstances of each case must be considered. We are committed to striking the correct balance between consistency and individual consideration. To that end, we will strive to maintain an appropriate degree of flexibility in implementing our enforcement policies.

One key area of flexibility concerns remedies that go to the heart of controlling pollution. We believe that pollution prevention-based responses—those that look to process changes or product substitution to reduce discharges rather than "end-of-pipe" solutions—offer great promise for businesses and municipalities. We recognize that such solutions may require legal and technical innovation, and we will work with those who are willing to make them a reality.

IV. CONCLUSION

As guardian of the public interest, the Attorney General plays an indispensable role in protection of the State's environment. In his dual role as lawyer for the State's administrative agencies and as independent advocate for the people of the State, the Attorney General has a significant influence on the direction of environmental enforcement.

We are committed to aggressive, innovative and fair enforcement of environmental laws. To that end, our office will continue to utilize to the fullest extent the variety of legal tools available, including both traditional and non-traditional statutory and common law sources of authority.

We believe that opportunities abound for innovative solutions to seemingly intractable environmental problems, and are committed to working with DEC, other state agencies, and the regulated community to explore these opportunities.

Our goal is clear: to ensure that the laws enacted by the people's representatives to protect and preserve the natural resources of our State are fully and faithfully enforced. In doing so, we will be carrying on our State's proud tradition of acting as a responsible steward for our irreplaceable natural treasures.

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[1] New York State Constitution, Art. XIV, § 1.

[2] New York State Executive Law ("Exec. L."), Art. 27.

[3] National Environmental Policy Act, 42 U.S.C. §§ 4321-4370.

[4] State Environmental Quality Review Act, New York State Environmental Conservation Law ("ECL"), Art. 8.

[5] ECL § 11-0535.

[6] Michael Soule, "What is Conservation Biology," in *Environmental Policy and Biodiversity*, 48 (1994).

[7] U.S. Environmental Protection Agency, *National Water Quality Inventory: 1996 Report to Congress* (Apr. 1998) (EPA 841-R-97-008) ("*National Water Quality Inventory*"), ES-14 to ES-17, ES-24.

[8] *Id.* at ES-21.

[9] DEC, Unified Watershed Assessment and Watershed Protection and Restoration Priorities for New York State (1998) (available at <http://www.dec.state.ny.us/website/dow/uwa/uwarpt98.htm>.

[10] New York State Departments of Environmental Conservation and Health, "Eating Sport Fish: 1998-1999 Health Advice for the Capital District, Hudson River, New York Harbor, Fresh Waters of Long Island and Marine Waters of

New York." *See also* New York State Department of Health, "Health Advisories: Chemicals in Sport Fish and Game" (published annually).

[11] U.S. EPA, "Proposed Regulatory Revisions to the Total Maximum Daily Load Program and Associated Proposed Regulatory Revisions to the National Pollutant Discharge Elimination System and the Water Quality Standards Program," (Aug. 1999) (EPA 800-F-99-002) (at <http://www.epa.gov/owow/tmdl/tmdlfs.html>).

[12] *Id.*

[13] *National Water Quality Inventory*, at ES-29.

[14] Sarah Chasis and Mark Dorfman, "Testing the Waters 1999: A Guide to Water Quality at Vacation Beaches" (Natural Resources Defense Council, July 1999), v.

[15] *Id.* at 108-113.

[16] Amy Kyle, *et al.*, "Contaminated Catch: The Public Health Threat from Toxics in Fish" (Natural Resources Defense Council, Apr. 1998), 3.

[17] *Id.* at 78, 90-94.

[18] Jayne Mardock, Conrad Schneider, Gina Porreco, "No Escape: Can You Ever Really 'Get Away' From the Smog?" (Clean Air Network, Aug. 1999), 10-12.

[19] *See* U.S. EPA "Greenbook," <http://www.epa.gov/oar/oagps/greenbk/oucs>.

[20] Deborah Shprentz, *et al.*, "Breath-Taking: Premature Mortality Due to Particulate Pollution in 239 American Cities" (Natural Resources Defense Council, May 1996), 1, 66.

[21] Lawrie Mott, *et al.*, "Our Children At Risk: The 5 Worst Environmental Threats to their Health" (Natural Resources Defense Council, Nov. 1997), 1.

[22] *Id.*

[23] Natural Resources Defense Council, "Think Before Your Drink" (July 1994) 3.

[24] U.S. Geological Survey, National Water Quality Assessment Pesticide National Sysnthesis Project, "Pesticides in Surface and Ground Water of the United States" (1998).

[25] P. Eisler, *Lax oversight raises tap water risks*, USA Today, Oct. 21, 1998 at 15A.

[26] 50 C.F.R. Part 17.

[27] 6 N.Y.C.R.R. § 182.6.

[28] Luz Claudio, *et al.*, "Socioeconomic Factors and Asthma Hospitalization Rates in New York City," 36 *Journal of Asthma* 343 (1999).

[29] *Id.*

[30] *See, e.g.*, Environmental Research Foundation, "Rachel's Environment and Health Weekly," No. 664 (Aug. 19, 1999).

[31] U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assistance (OECA), Presentation by Principal Deputy Assistant Administrator Sylvia Lowrance, February 3, 1999 ("OECA Compliance Summary"). *See also*, B. Worth, "Asleep on the Beat," Washington Monthly (Nov. 1999).

[32] OECA Compliance Summary. *See also* T. Watson, *Study: 4 of 10 factories violated Clean Air Act*, USA Today, May 20, 1999 at 3A.

[33] OECA Compliance Summary.

[34] U.S. Environmental Protection Agency, Storm Water Phase 2 Federal Advisory Committee, oral presentation (1998).

[35] U.S. Environmental Protection Agency, Water Facts, <http://es.epa.gov/oeca/oc/fact.html>.

[36] OECA Compliance Summary.

[37] U.S. EPA, OECA, Presentation to National Association of Attorneys General, Enforcement Chiefs' Conference (June 14, 1999).

[38] 20 *Inside EPA* 1-6 (May 14, 1999).

[39] B. Worth, "Asleep on the Beat," Washington Monthly (Nov. 1999).

[40] *State of New York, et al. v. Sour Mountain Realty Corp.*, Index No. 99/986, (Sup. Ct. Dutchess Co., March 30, 1999).

[41] *See also* Exec. L. § 63(7), which provides in relevant part that the Attorney General "may, on behalf of the State, agree upon a case containing a statement of the facts and submit a controversy for decision to a court of record . . . ."

[42] *People v. Brooklyn etc. R. Co.*, 89 N.Y. 75 (1882).

[43] *People v. McClellan*, 118 A.D. 177, 179 (1st Dept. 1907), *aff'd*, 188 N.Y. 618.

[44] *People v. Finch, Pruyn & Co., Inc.*, 207 A.D. 76, 78 (3d Dept. 1923) ("There was power in the Attorney-General to make a settlement of the suit. . . . If he did not possess such power under section 62 of the Executive Law he certainly possessed it under the common law"); *People v. Central Cross-Town R.R. Co.*, 21 Hun. 476, 480 (1880) (a lawsuit in the name of the State is "altogether under the control of the attorney-general, to be prosecuted or abandoned as his judgment dictated"); *People v. Tobacco Mfg. Co.*, 42 How. Prac. 162 (1871) (the Attorney General "acting as representative of the people, may . . . exercise complete control" of the claims asserted and "what the public interest require"); *People ex rel. Peabody v. Attorney General*, 22 Barb., 114, 118 (1856) (the Attorney General "has been endowed with large discretion, not only in cases like this [action to determine right to public office], but in other matters of public concern").

[45] *The State of New York by Eliot Spitzer, Attorney General of the State of New York v. The City of New York, et al.*, Index No. 15942/99 (Sup. Ct. Kings Co., filed on May 10, 1999).

[46] ECL Art. 8.

[47] *Abrams v. Love Canal Revitalization Agency*, 134 A.D.2d 885 (4th Dept. 1987).

[48] Courts have broadly construed the authority conferred on the Attorney General by Executive Law § 63(12). As stated by the New York Court of Appeals, pursuant to this section "[t]he Attorney General is granted broad authority to conduct investigations, on the complaint of others or on his own information, with respect to illegal business practices . . . [and] in furtherance thereof he is authorized to issue subpoenas . . . ." *Napatco, Inc. v. Lefkowitz*, 43 N.Y.2d 884, 885 (1978). The Attorney General's discretion in issuing § 63(12) subpoenas is afforded deference by the courts: "unless the subpoena calls for 'documents which are utterly irrelevant to any proper inquiry'" the subpoena will survive a motion to quash. *La Belle Creole Intern. S.A. v. Attorney General*, 10 N.Y.2d 192, 196 (1961), *rearg. den.*, 10 N.Y.2d 1011, *quoting Carlisle v. Bennett*, 268 N.Y. 212 (1935) and *Dairyman's League Co-op. Assn. v. Murphy*, 274 A.D. 591 (1st Dept. 1948), *aff'd*, 299 N.Y. 634 (1949).

It is true that the burden of demonstrating an adequate factual basis for issuance of an Executive Law § 63(12) subpoena rests with the Attorney General, *Oncor Communications, Inc. v. State*, 165 Misc. 2d 262 (Sup. Ct. Albany Co. 1995), *aff'd*, 218 A.D.2d 60 (3d Dept.). However, "the Attorney General enjoys a presumption that he is acting in good faith . . . and must show only that the materials sought bear a reasonable relation to the subject matter under investigation and to the public purpose to be achieved." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988). In meeting this standard, "all that is required is that the scope of the subpoena and the basis for its issuance be more than isolated or rare complaints by disgruntled persons." *In re CHANGE-New York, Inc. v. New York State Board of Elections*, 201 A.D.2d 245, 247 (3d Dept. 1994). Likewise, the Attorney General may issue a subpoena to a foreign corporation "as long as [the Attorney General] has reasonable basis for believing that the corporation violated a New York statute" as part of "an investigation designed to ascertain the facts." *La Belle Creole, supra*, 10 N.Y.2d at 198.

[49] *See, e.g., People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926); *Lefkowitz v. Bull Investment Group*, 46 A.D.2d 25 (3d Dept. 1974), *lv. to appeal denied*, 35 N.Y.2d 647 (1975); *State v. Colorado Christian College*, 76 Misc. 2d 50, 56 (Sup. Ct. N.Y. Co. 1973); *State v. Interstate Tractor Trailer Training*, 66 Misc. 2d 678, 682 (Sup. Ct. N.Y. Co. 1971); *State v. Bevis Industries*, 63 Misc. 2d 1088, 1090 (Sup. Ct. N.Y. Co. 1970).

[50] The term "persistent fraud" or "illegality" is defined in § 63(12) to include "continuance or carrying on of any fraudulent or illegal act or conduct." The term "repeated" is defined to include "repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person."

[51] *See, e.g., People v. American Motor Club*, 179 A.D.2d 277 (1st Dept. 1992) (New York Insurance Dept.); *Abrams v. Winter*, 121 A.D.2d 287 (1st Dept. 1986) (Attorney General has concurrent jurisdiction with New York State Division of Housing and Community Renewal over rent law violations); *Lefkowitz v. Scottish American Assn.*, 52 A.D.2d 528 (1st Dept. 1976) (violation of Civil Aeronautics Board regulations); *Abrams v. Solil Management Corp.*, 128 Misc. 2d 767 (Sup. Ct. N.Y. Co. 1985), *aff'd*, 114 A.D.2d 1057 (1st Dept.) (rent law violations); *Lefkowitz v. MacDonald*, 69 Misc. 2d 456 (Sup. Ct. N.Y. Co. 1972) (violations of Aviation Law otherwise enforced by N.Y. Board of Commissioner of Pilots).

[52] *Wiener v. People by Abrams*, 119 Misc. 2d 970 (Sup. Ct. Kings Co. 1983).

[53] *Minuteman Research, Inc. v. Lefkowitz*, 69 Misc. 2d 330 (Sup. Ct. N.Y. Co. 1972) quoting *Prestige Sewing Stores of Queens v. Lefkowitz*, 54 Misc. 2d 188, 189 (Sup. Ct. N.Y. Co. 1967).

[54] See, e.g., "Matter of Investigation by the Attorney General of the State of New York of the Illegal Disposal of Recyclable Materials" (issued Dec. 1999).

[55] Pursuant to ECL § 71-2727(2), the Attorney General "on his own initiative, or at the request of the [DEC] commissioner, may initiate any appropriate action or proceeding to enforce any provision of article . . . 71 or any rule or regulation promulgated pursuant thereto . . . ."

[56] For example, the Attorney General is given explicit authority to bring actions:

- to restrain violations of regulations governing releases from reservoirs in upstate counties, ECL § 71-1112;
- to bring an action for civil penalties for violations of the state's water pollution laws, ECL § 71-1929(3);
- to collect penalties for spills of bulk liquids as well as cleanup costs, ECL § 71-1941(2);
- to recover civil penalties for violations of state air pollution laws, ECL § 71-2103(2);
- to enjoin violations and collect civil penalties for violation of uranium mining regulations, ECL §§ 71-1201 through 71-1207;
- to enjoin violation of a DEC Commissioner's order with respect to freshwater wetlands, ECL § 71-2305(1);
- to enjoin violations of and collect civil penalties for violations of the tidal wetlands act, ECL § 71-2505; and
- to seek injunctive relief and civil penalties for violations of solid and hazardous waste laws, ECL § 71-2727(2).

[57] *United States v. Hooker Chemical & Plastics Corp.*, 722 F. Supp. 960 (W.D.N.Y. 1989).

[58] *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

[59] *State v. Ferro*, 189 A.D.2d 1018 (3d Dept. 1993); *State of New York v. Schenectady Chemicals, Inc.*, 117 Misc. 2d 960 (Sup. Ct. Rensselaer Co. 1983), *aff'd as modified*, 103 A.D.2d 33 (3d Dept. 1984); *State v. Waterloo Stock Car Raceway, Inc.*, 96 Misc. 2d 350, 358 (Sup. Ct. Seneca Co. 1978); *State v. Ole Olsen*, 76 Misc. 2d 796 (Sup. Ct. Westchester Co. 1973), *aff'd*, 45 A.D.2d 821 (2d Dept. 1974), *aff'd as modified*, 35 N.Y.2d 979 (1975).

[60] *State of New York v. General Electric Company*, Index No. 6637-99 (Sup. Ct. Albany Co., filed Nov. 15, 1999).

[61] *State of New York et al. v. Monoco Oil Company, Inc. et al.*, Index No. 99-10268 (Sup. Ct. Monroe Co., filed Sept. 29, 1999).

[62] States are included within the definition of persons authorized to bring citizen suits under federal environmental laws. *See, e.g.*, 42 U.S.C. §§ 7604(a), 7602(e) (Clean Air Act); 33 U.S.C. §§ 1365(g), 1362(5) (Clean Water Act); 42 U.S.C. §§ 6972(a), 6903(15) (Solid Waste Disposal Act).

[63] In September 1999, the Attorney General sent Clean Air Act sixty-day notices to several Midwest utilities, Midwestern states, and EPA. EPA subsequently initiated enforcement actions against three of the utilities, and New York has moved to intervene in those actions as a co-plaintiff. *United States v. American Electric Power Service Corp., et al.*, No. C2-99-1182, (S.D. Ohio, filed Nov. 3, 1999); *United States v. Ohio Edison Company, et al.*, No. C2-99-1181 (S.D. Ohio, filed Nov. 3, 1999).

[64] This is not, strictly speaking, a "new" policy, but one that has been revived after being dormant for some time. *See* Dean C. Sommer and Douglas H. Ward, "Beyond Compliance Enforcement," National Environmental Enforcement Journal, March 1993, discussing multi-media enforcement by the New York Attorney General's office.

[65] *See, e.g., State of New York v. Arkay Packaging Corp.*, Index No. 98-16718, (Sup. Ct. Suffolk Co., filed July 28, 1998); *State of New York v. Arkay Packaging Corp.*, Index No. 99-06988 (Sup. Ct. Suffolk Co., filed March 23, 1999) (air pollution and hazardous waste violations); *State of New York v. Monoco Oil Company, Inc.*, *supra*, (air pollution, water pollution, and oil spill violations).

[66] *State of New York v. Monoco Oil Company, Inc.*, *supra*, and *People v. Monoco Oil Company, Inc.* (Pittsford Town Court, filed Sept. 27, 1999).

[67] The term "environmental justice" has been defined by EPA's Office of Environmental Justice as:

> The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies.

Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, April 1988, U.S. EPA Office of Federal Activities, Washington, D.C.

[68] *Spitzer v. Farrell* (N.Y. Sup. Ct.) (filed Jan. 27, 2000).

[69] 25 U.S.C. §§ 3001 through 3013.

[70] State of New York, Seneca Nation of Indians and Tonawanda Seneca Nations v. Richard Michael Gramly, Great Lakes Artifacts Repository, and Canisius College, Civ. No. 99-1045 (W.D.N.Y. filed Dec. 28, 1999).